RASAMAH PERIAN & ANOR.

v.

GOH NGEU BONG & ANOR.

HIGH COURT MALAYA, SEREMBAN
PEH SWEE CHIN J
[CIVIL SUIT NO. 108 OF 1982]
8 JANUARY 1985

TORT: *Motor accident - Evidence indicated contributory negligence.*

DAMAGES: *Liability apportioned 4/5 to deceased and 1/5 to defendant - Quantum assessed accordingly.*

The deceased was involved in a collision with a motor lorry driven by the second defendant and succumbed to the injuries he received thereby.

The two witnesses who testified for the defence gave evidence indicating that the deceased had overtaken the motor lorry and knocked into the right front part of the lorry. The learned Judge found that the witnesses' statements were the truth and were not in any way biased.

Held:

[1] The deceased was liable to the extent of 4/5 and the second defendant for 1/5 because he had failed to notice the motor cyclist coming up from behind him.

[2] On the quantum the value of dependancy was assessed at RM400 from an income of RM600 per month. Number of years of purchase of the annuity was fixed at 16. Another RM550 was awarded for costs of tombstone and special damages as agreed subject to liability being proved.

[Judgement for the Plaintiffs. All amounts to be reduced on account of contributory negligence of deceased. Usual interest also awarded.]

Case referred to:
Joginder Kaur & Anor. v. Malayan Bank & Anor. [1971] 1 MLJ 98

For the plaintiffs - N. Ramachandran (S.Seeralan with him); M/s Mahadevi Ganeshmurugan & Co. For the defendants - Tee Kim Chan; M/s. Shearn Delamore & Co.

JUDGMENT

Peh Swee Chin J:

On the early morning of 7 May 1979 at about 7 a.m. it was drizzling when the deceased concerned in this case, riding a motor cycle, was involved in a collision with a motor lorry driven by the second defendant herein, in which the deceased succumbed to the injuries he received thereby. The scene of the accident was the Kuala Lumpur/Seremban highway, on the two-lane left half of the highway in the direction of Seremban.

There were only two witnesses or eye-witnesses in Court, both called by the defence, unfortunately for the plaintiffs, the administrators of the estate of the deceased. The first eye-witness was the lorry driver, DW1. He said his lorry was loaded with soap powder and the said motor cycle overtook his lorry and knocked into the right front part of the lorry. He lost control over the lorry which was found to have veered towards the side-table on his left and overturned, ending up to lie on its right-hand-side body.

When cross-examined, he said the accident took place on the left-hand side of the road near the edge of the road and that the tyre mark appearing on the side-table was long because the latter was wet. He tried to avoid the collision by swerving to his left. The first time he came to know about the motor cycle was when the motor cycle knocked into his lorry. The police report lodged by DW1 was to the same effect.

The second eye-witness, a van driver (DW2) said he was following behind the said motor lorry and he saw the collision. Prior to the collision, he said the said motor cycle was in front of him with the motor cycle itself following the said motor lorry. He saw the motor cycle overtake the said motor lorry and he saw further the said motor lorry swerve to its left to avoid something. He did not know what that something was. He saw the said motor lorry fall.

When cross-examined, he said he had full visibility of the road in front. He knew the defendant personally before the accident. He maintained what he said earlier of what he saw. After the said motor lorry had overturned, he saw a second lorry over-taking him from his right.

The sketch plan showed the motor cycle to be lying over the broken line dividing the two lanes with its front portion facing at an angle the right edge of the right-hand-side lane. On the left-hand-side lane, were found scratch marks and blood stain, 8 to 9 ft. from the motor cycle. The said motor lorry was found completely off the metalled road on the side table with a tyre mark appearing between it and the left edge of the left-hand-side lane.

I had to caution myself as to the fact that the evidence of DW1 and DW2 could have been easily tainted by exaggeration or even falsehood, with the obviously comfortable knowledge that the deceased would be in no position to answer back. There was this added factor of prior acquaintance between DW1 and DW2 so that DW2 would have been favourably disposed to DW1 when giving evidence.

I observed their demeanour, compared their evidence *inter se*, looking for any betrayal of their evidence from the sketch plan. I remained thoroughly convinced that they were witnesses of truth. Both DW1 and DW2 were so careful so as not to cause any unnecessary damage to the plaintiffs' case that DW1 said that the first time he saw the motor cycle was when the latter knocked into his lorry and that DW2 was even reluctant to draw the obvious inference that the motor lorry swerved to the left to avoid the motor cycle when he said the lorry was trying to avoid something, and that he did not know what that something was. The swerving must have been fairly violent as to cause the overturning, I held that it must have occurred while in the course of avoiding that motor cycle.

I found the deceased liable to the extent of 4/5 and the DW1 1/5, because DW1 had not seen the motor cycle coming up from behind him until it was too late. To keep to his side of the road at a moderate speed with his eyes looking in front of him would not be sufficient, a driver ought to be constantly aware of what is behind him so as to avoid any accident within the limits of his means at his disposal.

I was not unaware of the rather generous concession of the learned counsel for the defendants when he suggested that liability should be shared equally. I did not feel bound to accept his suggestion for liability must be based solely on the evidence and nothing else. Undoubtedly learned counsel had the best of intentions and was trying to be very fair to the plaintiffs by adopting a modest position of his case.

On the quantum, I assessed the value of dependancy at RM400 from an income of about RM600 per month. The widow said that the deceased required RM100 per month for travelling expenses. Another RM100 ought to be deducted for the cost of his food and pocket expenses.

I fixed the number of years of purchase of the annuity at 16 bearing in mind that the deceased was 33 years of age at time of his death. Useful reference can be made to the Federal Court case of *Joginder Kaur & Anor. v. Malayan Bank & Anor*. [1971] 1 MLJ 98 in which the deceased was 35 years of age, and the number of years' purchase was fixed at 12. I took account of the occupation of the deceased in the instant case i.e. that of a school teacher as compared with other rather hazardous occupations e.g. of lorry driver and the like.

I gave judgment also for RM550 being the cost of the tombstone and special damages as agreed subject to liability being proved. All damages, of course, would have to be reduced on account of the contributory negligence of the deceased. I also awarded the usual interest.

Also found at [1985] 1 CLJ 213